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IN THE

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Supreme Court of the United States

October Term, 1942.  
No. 379.

TITLE INSURANCE AND TRUST COMPANY, a corporation,  
*Petitioner,*

*vs.*

HARRY C. MABRY, as Executor of the Last Will and  
Testament of William J. Garland, Deceased, *et al.,*  
*Respondents.*

BRIEF FOR RESPONDENT MABRY IN OPPO-  
SITION TO PETITION FOR WRIT OF  
CERTIORARI.

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liam J. Garland, deceased.*



## SUBJECT INDEX.

	PAGE
Preliminary statement .....	1
Unsupported assertions and assumptions of petitioner.....	8
Petitioner's real contention reduces itself to a question of fact..	13
Petitioner's fears of personal liability are fanciful.....	15
Petitioner's actual representation of unborn contingent remain- dermen .....	17
I.	
The instant petition is not sufficient to confer jurisdiction.....	21
A. The constitutional question now presented is not shown by the record to have been raised in the state court.....	21
B. Petitioner's interests are not directly involved in such manner and degree as to entitle it to raise the question of due process which it now advances.....	24
C. The state court decision is based upon independent and adequate grounds of general or state law which preclude any examination of the federal question which petitioner would raise .....	27
II.	
The instant petition presents no federal question of substan- tiality .....	30
Representation of the interests of the unborn contingent re- maindermen by a guardian ad litem especially appointed for the purpose supplies all the requisites of due process.....	32
The application at bar of the doctrine of virtual representation constituted due process .....	38
Absence of hostility, not identity of motives, is the test.....	38
An ancient and uniformly recognized procedure.....	40
Intrinsic fairness of the virtual representation at bar.....	42

ii.

	PAGE
Alzoa Scott was competent to represent her unborn grand-children in the compromise proceeding.....	48
Fact of compromise does not preclude virtual representation .....	50
Hansberry and Riley decisions afford no support to petitioner's contentions .....	51
The trustee's representation of the unborn remaindermen is alone sufficient to sustain the jurisdiction of the court.....	54
Trustee's claim that its refusal to consent to compromise destroys court's jurisdiction.....	57

III.

Unborn contingent remaindermen do not own any property and hence there is no subject matter upon which the Fourteenth Amendment can operate .....	60
---	----

---

INDEX TO APPENDIX.

Examples 1 to 8.....	App. p. 1
----------------------	-----------

### iii.

#### TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Aetna Life Insurance Co. v. Dunken, 266 U. S. 389.....	9
American Bible Society v. Price, 115 Ill. 623.....	55
Anderson v. Wilkins, 142 N. C. 154.....	62
Ashwander v. Tenn. Valley Authority, 297 U. S. 288.....	24
Bell Tel. Co. v. Penn. P. U. Com., 309 U. S. 30.....	51
Bennett's Guardian v. Cary's Executor, 210 Ky. 725.....	55
Bowe v. Scott, 233 U. S. 658.....	29
Burgess v. Nail, 103 Fed. (2d) 37.....	55
Butterfield v. Sawyer, 187 Ill. 598.....	62
California Water Service Co. v. Redding, 304 U. S. 252.....	30
Canfield v. Security-First National Bank, 13 Cal. (2d) 1.....	37
Capital City Dairy Co. v. Ohio, 183 U. S. 238.....	21
Chapman v. Goodnow's Administrator, 123 U. S. 540.....	31
Cincinnati Street Railway Co. v. Snell, 193 U. S. 30.....	32
City of Allegan v. Consumers' Power Co., 71 Fed. (2d) 477 (cert. den. 293 U. S. 586).....	24, 25
City of Pasadena v. Superior Court, 157 Cal. 781.....	30
Clarke v. Cordis, 4 Allen 466.....	35
Clarke v. McDade, 165 U. S. 168.....	21
Cole v. Superior Court, 63 Cal. 86.....	7, 11
Converse, Ex parte, 137 U. S. 624.....	32
Copeland v. Wheelright, 230 Mass. 131.....	35, 62
County of Los Angeles v. Winans, 13 Cal. App. 234.....	40, 50
Cousins, Estate of, 111 Cal. at 451.....	27
Curran v. Pecho Ranch & Stock Co., 95 Cal. App. 555.....	40, 50
Curry v. McCanless, 307 U. S. 374.....	61
Davis v. Mills, 194 U. S. 457.....	62
Deming v. Carlisle Packing Co., 226 U. S. 102.....	63
Dewey v. Des Moines, 173 U. S. 193.....	21

iv.

	PAGE
Du Bois v. Judy, 291 Ill. 340.....	60, 61
Duffill, Estate of, 188 Cal. 536.....	22, 31
DuPont v. DuPont, 18 Del. Ch. 316.....	55
Eakle v. Ingram, 142 Cal. 15.....	56
Enterprise Irr. Dist. v. Farmers Mutual Canal Co., 243 U. S. 157.....	28, 30
Erie R. Co. v. Tompkins, 304 U. S. 78.....	35, 56
Federal Union Trust Co. v. Field, 311 U. S. 169.....	30
First National etc. Bank v. Superior Court, 19 Cal. (2d) 409....	57
Fox Film Corp. v. Muller, 296 U. S. 207.....	28
Fox River Paper Co. v. R. R. Com., 274 U. S. 657.....	61
Gartenlaub, Estate of, 185 Cal. 655.....	49
Gorman v. Russell, 14 Cal. 531.....	40
Gould v. Superior Court, 47 Cal. App. 197.....	59
Gray v. Union Trust Co., 171 Cal. 637.....	22, 31, 56
Grayson v. Harris, 267 U. S. 352.....	9
Great Northern Ry. Co. v. Knapp, 240 U. S. 464.....	9
Green v. Grant, 143 Ill. 61.....	55
Gunnell v. Palmer, 370 Ill. 206.....	36
Hansberry v. Lee, 311 U. S. 32.....	
.....4, 8, 11, 20, 29, 31, 32, 33, 38, 52, 53, 54	
Harding v. Illinois, 196 U. S. 78.....	21
Hartford L. Ins. Co. v. Ibs, 237 U. S. 662.....	41, 53
Hawkins & Roberts v. Jerman, 147 Ore. 657.....	60, 61
Hendrick v. Maryland, 235 U. S. 610.....	24
Honeyman v. Hanan, 300 U. S. 14.....	31
Hubbell, Estate of, 121 Cal. App. 38.....	22, 31, 56
Hutchins v. Security Trust and Savings Bank, 208 Cal. 463.....	57
Irving Trust Co. v. Day, 314 U. S. 556.....	62
Jackman v. Rosenbaum Co., 260 U. S. 22.....	41, 53
Jennings v. Capen, 321 Ill. 291.....	62

	PAGE
Johnson v. Curley, 83 Cal. App. 627.....	55
Jones v. Union Oil Co., 218 Cal. 775.....	59
Knotts v. Stearns, 91 U. S. 638.....	41, 53, 61
Lawrence v. State Tax Commission, 286 U. S. 276.....	31
Lehon v. Atlanta, 242 U. S. 53.....	24, 25
Lewis v. McConche, 151 Kan. 778.....	36
Liberty Warehouse Co. v. Burley etc. Assn., 276 U. S. 71.....	24
Live Oak etc. Assn. v. R. R. Com., 269 U. S. 354.....	22
Lyman v. Lyman, 293 Pa. 490.....	36
Lynch v. New York ex rel. Pierson, 293 U. S. 52.....	22, 28, 29
Marshall Dental Mfg. Co. v. Iowa, 226 U. S. 460.....	9
Massachusetts v. Mellon, 262 U. S. 447.....	24
McArthur v. Scott, 113 U. S. 340.....	32, 41, 53, 55
McGoldrick v. Compagnie Gen. Transatlantique, 309 U. S. 430.....	21
Mercer v. Downs, 191 N. C. 203.....	60, 61
Michigan Sugar Co. v. Dix, 185 U. S. 112.....	21
Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287 .....	33
Miller v. Texas & Pacific R. Co., 132 U. S. 662.....	32, 41, 53, 55
Milwaukee etc. Co. v. Wisconsin ex rel. Milwaukee, 252 U. S. 106 .....	51
Minor v. Happersett, 88 U. S. 162.....	41, 53
Missouri v. Lewis, 101 U. S. 22.....	32
Moor v. Vawter, 84 Cal. App. 678.....	56
Morris v. Standard Oil Company, 192 Cal. 343.....	8
Neblett v. Carpenter, 305 U. S. 297.....	51
New York ex rel. Cohn v. Graves, 300 U. S. 308.....	21
New York Life Ins. and Trust Co. v. Conkling, 144 N. Y. S. 642 .....	58
North Jersey Title Ins. Co., In re, 120 N. J. E. 148.....	62
Northwestern B. T. Co. v. Nebraska State R. Co., 297 U. S. 471 .....	21

Oliver Iron M. Co. v. Lord, 262 U. S. 172.....	24
Owenby v. Morgan, 256 U. S. 94.....	35, 42
Pearsall v. Great Northern R. Co., 161 U. S. 673.....	62
Perkins v. Burlington L. & Imp. Co., 112 Wis. 509.....	55
Plaquemines Tropical Fruit Co. v. Henderson, 170 U. S. 511....	32
Portland Ry. etc. Co. v. Railroad Com. of Oregon, 229 U. S. 397 .....	9
Public Utilities Com. v. Landon, 249 U. S. 236.....	24
Reynolds v. Reynolds, 208 N. C. 578.....	58
Reynoldson v. Perkins, Amb. 564, 27 Eng. Reprint 362, de- cided in 1769 .....	40, 61
Riley v. New York Trust Co., 315 U. S. 343.....	8, 20, 53
Riley v. Worcester County Trust Co., 89 Fed. (2d) 59.....	51
Ringwalt v. Bank of America etc. Assn., 3 Cal. (2d) 685.....	36
Riverside Tr. Co. v. Twitchell, 342 Pa. 558.....	60, 61
Robinson v. Barrett, 142 Kan. 68.....	36
Robinson v. N. Y. Life etc. Co., 133 N. Y. S. 257.....	60, 61
Rose v. Southern Michigan Nat. Bank, 255 Mich. 275.....	58
Ruhlin v. N. Y. Life Ins. Co., 304 U. S. 202.....	56
Saltonstall v. Saltonstall, 276 U. S. 260.....	21
Shindler v. Robinson, 135 N. Y. S. 1056, 150 App. Div. 875.....	60, 61
Smith, Estate of, 4 Cal. App. (2d) 548.....	38
Smith v. Swarmstedt, 16 How. 288.....	41, 53
Snyder v. Massachusetts, 291 U. S. 105.....	33
Spencer v. McCleneghan, 202 N. C. 662.....	58
State v. District Court, 90 Mont. 213.....	38
Supreme Tribe of Ben Hur v. Cauble, 255 U. S. 356.....	41, 53
Temple v. Scott, 143 Ill. 290.....	55
Thomas v. Iowa, 209 U. S. 258.....	21
Troy, Estate of, 214 Cal. 53.....	60, 61
Truax v. Corrigan, 257 U. S. at 373.....	32

	<b>PAGE</b>
Twining v. New Jersey, 211 U. S. 101.....	32, 35
United Gas etc. Co. v. Texas, 303 U. S. 137.....	30
Wagner Electric Co. v. Lyndon, 262 U. S. 226.....	63
Ward v. Ward, 153 Kan. 222.....	36
Ward and Gow v. Krinsky, 259 U. S. 503.....	9
Watkins v. Bryant, 91 Cal. 492.....	55
West v. American Tel. & Tel. Co., 311 U. S. 223.....	56
Whitney, Estate of, 176 Cal. 12.....	60, 61
Whitney v. California, 274 U. S. 357.....	21
Whitten v. Dabney, 171 Cal. 621.....	8, 11
Williamson v. Suydam, 6 Wall. 723.....	62
Wolf v. Uhlemann, 325 Ill. 165.....	58
Woolsey v. Woolsey, 78 N. J. Eq. 517.....	55
Zadig v. Baldwin, 166 U. S. 485.....	22

#### STATUTES.

California Civil Code, Sec. 694.....	9, 60, 61
California Civil Code, Sec. 695.....	10, 60, 61
California Civil Code, Sec. 2269.....	58
California Code of Civil Procedure, Sec. 187.....	6, 30, 36, 38
California Constitution, Art. I, Sec. 13.....	29
California Land Title Law (1915), Sec. 13.....	36
California Probate Code, Sec. 1123.....	36
Constitution, Art. VI, Sec. 5.....	36
Soldiers and Sailors Civil Relief Act of 1940, Sec. 200, Subd. 3 (50 U. S. C. A., App., Sec. 520, Subd. 3, p. 116).....	36
Uniform Trustees' Accounting Act (1936), Sec. 9 (9 U. L. A., p. 706).....	36
28 United States Code Annotated, Sec. 861a.....	63
28 United States Code Annotated, Sec. 878.....	63

## TEXTBOOKS.

	PAGE
20 American Jurisprudence, Sec. 630, p. 532.....	45
33 American Jurisprudence, Sec. 72, p. 532.....	61
19 American Law Reports 247, note.....	62
2 Annotated Cases 790, notes.....	41
Annotated Cases 1913C, p. 65, notes.....	41
3 Bogert on Trusts and Trustees, Sec. 527, p. 1666.....	26
California Annotated, p. 87, Comment w.....	60, 61
10 California Jurisprudence, Sec. 310, p. 1062.....	45
2 Cooley's Const. Lim. (8th Ed.), pp. 749-54.....	62
31 Corpus Juris Secundum, Sec. 72, p. 91.....	60, 61
31 Corpus Juris Secundum, Sec. 81, p. 95.....	61
5 Law Quarterly Review, p. 370.....	35
McGhee, Due Process of Law, p. 157.....	62
2 Perry on Trusts and Trustees (7th Ed.), Sec. 924, p. 1572....	27
4 Pomeroy's Equity Jurisprudence (5th Ed.), Sec. 1064, pp. 179-180.....	26
Restatement in the Courts, The, 4th Ed., p. 9.....	37
Restatement of Law of Property, Sec. 157, p. 563.....	60, 61
Restatement of the Law of Property, Sec. 182.....	36
Restatement of the Law of Property (Future Interests), Sec. 182, p. 734.....	34
Restatement of the Law of Property, Sec. 184, Subd. (e).....	38
Restatement of the Law of Property, Sec. 185, Comment b, p. 747.....	39
Restatement of the Law of Property, Sec. 185, Comment f, p. 745.....	39
Restatement of the Law of Property, Sec. 185, Comment b, p. 746.....	51
Restatement of the Law of Property, Sec. 186.....	54
Restatement of Law of Restitution, Sec. 73.....	27
Restatement of the Law of Trusts, Sec. 201, comment a, p. 531....	26
Restatement of Trusts, Sec. 204.....	27
6 Ruling Case Law, Sec. 303, p. 316.....	62
2 Scott on Trusts, Sec. 201, p. 1085.....	26
2 Scott on Trusts, Sec. 204, p. 1096.....	27





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BRIEF FOR RESPONDENT MABRY IN OPPO-  
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---

**Preliminary Statement.**

Having created the trust for the benefit of himself, his wife, four infant children and possible grandchildren [R. 599-601]. William J. Garland "filed a complaint in the Superior Court, alleging fraud, undue influence, and failure of consideration, and praying that the trust be cancelled and set aside, and that title to the real property and personal property involved be quieted in him" [R. 600]. "If an affirmative finding could have been made as to any such facts, supported by competent testimony, the court had power to terminate the trust" [R. 607]. Peti-

tioner does not challenge this statement. And such a decree in favor of plaintiff would mean complete destruction of all possible interests of unborn contingent remaindermen.

In petitioner's printed argument below, at page 5, respondent's brief was quoted:

"The court acquired jurisdiction to try the issues under the original complaint through virtual representation of the unborn remaindermen by the living defendants."

And counsel then said:

"We concede this, because the original complaint aimed at the total destruction of the trust. The interests of the living defendants in resisting that attack were substantially identical with those of the unborn, and those interests were so large as to create a presumption that the living defendants would resist that attack as vigorously and as faithfully as the unborn would have done if they had been present."

Likewise the petition for hearing in the Supreme Court said at page 22:

"The principles of virtual representation are properly applied to permit the court to *adjudicate on controverted issues presented to it*. This proposition was recognized by this appellant before the District Court of Appeal in conceding that in the defense of the settlor's initial attack on the trust the living, having substantially the same interests in repelling that attack as the unborn, could virtually represent the latter." (Emphasis by author.)

Obviously, with the interests of the unborn properly represented by the life tenants, there could be no claim

of want of due process so long as the plaintiff's complaint was being contested.

Petitioner's concession of initial jurisdiction over the interests of the unborn, through virtual representation, covers the entire period of the litigation down to the filing the Petition to Compromise. At this point it is claimed that a divestiture of jurisdiction over the interests of the unborn occurred and that henceforth the court had no power to make any order affecting those interests because the compromise was unfair to them. (See pp. 10-15 *infra*.)

The situation then confronting the parties and the court in determining whether the litigation should be pursued or compromised is thus described in the findings at R. 519:

"That there is a present substantial and actual risk to all the beneficiaries of said trust, other than plaintiff, including the unborn and unknown remaindermen thereof, if the above entitled and numbered action be not compromised as set forth in said petition to compromise or if the matter should proceed to trial upon the complaint and amendments to the complaint and the various answers on file thereto, in that plaintiff may prevail at the trial of said action and that the beneficiaries of said trust other than plaintiff, including the unknown and unborn remaindermen thereof, may or might lose all the benefits now conferred upon them by said declaration of trust, but under said compromise there is irrevocably saved and preserved to and for them the major portion of such benefits; that it is to the advantage of said beneficiaries of said trust, including the unborn and unknown remaindermen thereof, to settle and compromise their differences with plaintiff, and

to settle and dispose of said action on the basis of and in accordance with the agreement of compromise referred to in said petition to complaint \* \* \*."

And the District Court of Appeal held it to be:

"evident that the compromise was fair and equitable and that unless the case was thus disposed of, the plaintiff had presented a *bona fide* contention, which, if found true, would have required the annulment of the entire trust." [R. 609.]

The requisites of due process of law applicable to such a situation are prescribed by *Hansberry v. Lee*, 311 U. S. 32, at 42, as follows:

"Here, as elsewhere, the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits (citing cases); nor does it compel the adoption of the particular rules thought by this court to be appropriate for the federal courts. With a proper regard for divergent local institutions and interests (citing case), this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it. (Citing case.)"

Contemporaneously with the filing of Petition to Compromise every possible step was taken to assure full and fair representation of the unborn and unknown contingent remaindermen. Throughout the compromise phase of the case they were trebly represented—(1) by the life tenants acting through their guardian *ad litem*; (2) by Mr. Mathes, appointed specially as guardian *ad litem* to repre-

sent the interests of said remaindermen; and (3) in fact by the trustee, which has consistently and insistently maintained that the compromise is unfair to the unborn and hence should not be made. As soon as a *possibility* of conflict of interests arose, Mrs. Scott, the mother, retired as representative of the infant life tenants [R. 175], Mr. Hartke was appointed their guardian *ad litem* [R. 408], and Mr. Mathes was designated by formal court order [R. 578] to act as guardian *ad litem* for the preservation of the interests of unborn and unknown contingent remaindermen.

And the compromise which was effectuated as a result of this three-fold protection of the absentees was in no manner or degree unduly burdensome to them or otherwise unfair. The trial court found at R. 520-21:

“that the said compromise is not unfair, unjust or inequitable in any degree to the unborn or unknown recipients of the corpus of said trust upon the termination thereof, but, on the contrary, said compromise is fair, just and equitable to, and to the best interests of, all persons now interested and all persons who at any time in the future may or might be or become interested in said trust and its assets and properties, including the unborn and unknown remaindermen: that all parties defendant, except defendant Title Insurance and Trust Company, are sharing in and contributing substantially to the said compromise, and it is untrue that the entire financial burden of the said compromise, or any disproportionate part thereof is thrown upon the unborn and unknown remaindermen; \* \* \* that the dictates of equity and good conscience and the interests of all possible beneficiaries of said trust require that such compromise should be granted \* \* \*.”

The District Court of Appeal said in this connection at R. 609:

“Appellant suggests that the compromise was unfair and inequitable. It should be apparent from what has already been said that it is our conclusion that the trial court, having before it all of the facts in the case, properly held the compromise to be fair and equitable.”

And at R. 607:

“And computations are in the briefs which indicate that should any of these contingencies come to pass, neither income nor corpus will be depleted to the disadvantage of the remaindermen. Therefore, there was no adverse interest as between the living children and their issue which prevented the living children from representing the unborn contingent remaindermen.”

Those computations are reproduced in the Appendix hereto, and discussed at pages 44-48, *infra*. They prove that the eventuation of any of eight normal hypotheses would result in less contribution by the unborn remaindermen than by the four life tenants (their potential parents) in every instance except the seventh.

The appointment of a guardian *ad litem* for protection of the interests of the unborn remaindermen was the exercise of an inherent power of a California equity court; so held at R. 608. If statutory authority were needed, it would be found in Section 187, California Code of Civil Procedure, which is as follows:

“Means to carry jurisdiction into effect. When jurisdiction is, by the constitution or this code, or by any other statute conferred on a court or judicial

officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

The presence of a guardian *ad litem* charged solely with protection of the interests of the unborn and unknown contingent remaindermen and of the trustee (petitioner), who was vigorously opposing the compromise upon the ground that it was unfair to the unborn (while protesting that no one was representing them), was enough to assure a fair result. And this dual representation was superimposed upon the virtual representation of the four infant life tenants who never acted in person and throughout the compromise hearing were represented by a guardian *ad litem*; under California law he had the status of mere adviser to the court and could have no possible incentive to work any inequity with respect to the potential issue of his wards. Indeed, the compromise was actually made by the court and not by either guardian *ad litem*.

"The court is, in effect, the guardian—the person named as guardian *ad litem* being but the agent to whom the court, in appointing him (thus exercising the power of the sovereign state as *parens patriae*) has delegated the execution of the trust; and through such agent the court performs its duty of protecting the rights of the infant or incompetent person." (*Cole v. Superior Court*, 63 Cal. 86, 89.)

"And what are the principles governing the conduct of a guardian *ad litem*? It is the right and duty of the court to protect the interests of the incom-

petent represented by the guardian *ad litem* and to exercise supervision over the conduct of that guardian. \* \* \* The court and not the guardian *ad litem* has the power to compromise the rights of minors under suitable circumstances." (*Whitten v. Dabney*, 171 Cal. 621, 631-32.)

See, also:

*Morris v. Standard Oil Company*, 192 Cal. 343, 351.

The trial court found the making of the particular settlement to be the prudent and equitable thing to do [R. 519], and the District Court of Appeal said at R. 608:

"A court of equity in its general jurisdiction over trusts has power to do whatever is necessary to preserve a trust from destruction, including the power to modify and change the terms of the trust. (Citing cases.)

"In this case it was proper for the Chancellor to approve the compromise agreement, having in view the preservation of the trust itself."

#### **Unsupported Assertions and Assumptions of Petitioner.**

The "careful ambiguities and silences" of the instant petition call for a clarification of the state of the record in this case, and indeed of petitioner's ultimate contention. The holding in the cited cases of *Hansberry v. Lee*, 311 U. S. 32, and *Riley v. New York Trust Co.*, 315 U. S. 343, is expressed in this sentence of the Chief Justice, concurring in the *Riley* case: "To have bound him (the absent party) by representation of those so adverse in interest would have been a denial of due process" [p.

356]. And petitioner's zeal to come within these holdings leads it into assumptions and assertions that the record does not warrant.

(1) Each of petitioner's major arguments rests upon an asserted conflict of interest between the infant life tenants, as virtual representatives, and the unborn contingent remaindermen, as represented, with a resulting benefit to the former at the sole cost of the latter. This is directly in the teeth of the express finding of the two state courts, quoted above.<sup>1</sup>

(2) Nowhere in the petition are the potential children of the minor life tenants recognized as *contingent* remaindermen. The whole argument proceeds upon the assertion that the equitable remainder is "owned" by the potential issue of these infant life tenants,—that it "belongs absolutely and unconditionally to the absent remaindermen (subject only to deferment of their possession thereof)" [p. 28]. Similar expressions are found at Petition pages 3, 4, 9, 16 and 22. California Civil Code, Section 694 is as follows:

"Vested interests. A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest."

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<sup>1</sup>As to the effect of such findings of fact made by two state courts, see *Marshall Dental Mfg. Co. v. Iowa*, 226 U. S. 460, 461; *Portland Ry. etc. Co. v. Railroad Com. of Oregon*, 229 U. S. 397, 412; *Great Northern Ry. Co. v. Knapp*, 240 U. S. 464, 466; *Ward and Gow v. Krinsky*, 259 U. S. 503, 511; *Aetna Life Insurance Co. v. Dunken*, 266 U. S. 389, 394; *Grayson v. Harris*, 267 U. S. 352, 357.

And Section 695:

“Contingent interests. A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain.”

And the District Court of Appeal said:

“They are all contingent remaindermen. When it is necessary to distinguish between the two classes, issue of the living children will be referred to as unborn contingent remaindermen.” [R. 599.]

Petitioner asserts that “No person now living or ascertained has any interest in the corpus of this trust” [p. 6]; but the Petition to Compromise avers that “in the event that said trust \* \* \* were to finally terminate pursuant to its terms on this date, said Grace O. Garland and said Jane Mary Garland are all of the heirs and are the sole heirs at law of plaintiff” [R. 543], which averment was impliedly found to be true [R. 518]. Indeed, the instant petition refers to them as presumptive heirs and says, at page 18, that “Garland’s then wife and daughter \* \* \* would have been his heirs at law had he then been deceased”, thus showing that the remainder is presently vested in them subject only to defeasance through birth of issue of some of the four infant life tenants and their survival of all six life tenants. These “presumptive heirs” [R. 602] appeared in the compromise proceeding [R. 517-18] and the only absentees were the unborn and unknown contingent remaindermen. Petitioner counts only upon the supposed rights and alleged injuries of the unborn. Personal jurisdiction over the unborn persons being inherently impossible, it was equally impossible that any estate could vest in them prior to their

existence (see Point III, *infra*). And so the reiterated contention that they are "sole owners" of the remainder falls of its own weight.

(3) Further laboring to don the mantle of the *Hansberry* ruling, petitioner argues against the finding of the Appellate Court that:

"These contingencies are too remote to require a decision that the incentive on the part of the living children to protect and preserve the rights of their issue was destroyed. \* \* \* Therefore, there was no adverse interest as between the living children and their issue which prevented the living children from representing the unborn contingent remaindermen." [R. 607.]

And counsel urge the hypothetical motivation of the life tenants [aged 11 to 16 years—R. 543], saying:

"The important thing is that the children naturally viewed the compromise, quite aside from the benefit derived from the dismissal of the litigation, as otherwise advantageous to them. \* \* \* They desired the benefits accruing to them from the compromise and had no particular interest in seeing that the unborn remaindermen's *corpus* remained intact or was cut down as little as possible." [Petn. p. 21.]

But the fact is that these infants acted not in person, but through their guardian *ad litem*, Mr. C. H. Hartke [R. 535], who had no power to do more than recommend to the court; the compromise being made by the court and not the guardian. (See quotations from *Cole v. Superior Court* and *Whitten v. Dabney*, *supra*.) And so the putative cogitations of these children concerning the benefits to be gained over their potential issue count for naught.

(4) Again, the constant assertions throughout the petition that the entire burden of the compromise must be borne by the unborn contingent remaindermen, that they have "lost" \$120,000 of corpus [p. 21] with no corresponding gain, that the grandparents of these possible remaindermen "each raided the interest of the unborn" [p. 19], wholly disregard the contrary finding [R. 519-20] that the compromise was the prudent thing in order to save the entire remainder from the threat of destruction through successful prosecution of the pending action, which finding was approved by the District Court [R. 609].

(5) Concerning the representation of the unborn contingent remaindermen by Mr. Mathes as guardian *ad litem*, counsel assert [pp. 4, 25] that plaintiff selected and nominated Mr. Mathes. This finds no support in the record, which shows that the appointment was made on plaintiff's motion [R. 579] but does not sustain the assertion that he had any hand in selecting the guardian. Indeed, the formal order recites a previous appointment of Mr. Mathes [R. 578]. And counsel for petitioner paid him high tribute in their reply brief in the District Court of Appeal, saying at page 35:

"Mr. Mathes is an esteemed, an able and a justly honored and respected member of the bar. We know that he has performed what he conceived to be his duty in this proceeding with diligence and conscientiousness. His able brief in support of his position in the proceeding and of the compromise is an eloquent witness to that fact."

This leaves no room for the inference which petitioner would have the court draw from the assertion that the guardian was selected and nominated by plaintiff.

**Petitioner's Real Contention Reduces Itself to a Question of Fact.**

Actually obscured by these factitious aids is the position that petitioner took in the state courts and which is immanent in the instant petition and brief, namely, that there was a divestiture of existing jurisdiction over the interests of the unborn contingent remaindermen, not an original absence of such jurisdiction.

The significance of this, as will be shown, is that petitioner's present claim of denial of due process, when clearly defined, reduces itself to one of fact determinable upon common law principles and hence not a Federal question.

We have heretofore quoted the affirmative concessions made by petitioner in the state courts to the effect that it contended for a divestiture of jurisdiction as an incident to the compromise, not for an initial absence of jurisdiction or any want of due process in the proceeding antecedent to the Petition to Compromise. The opinion below clearly reflects this as appellant's viewpoint:

"The principal argument in support of this proposition is that the interests of living children and their unborn issue became adverse *when by the compromise agreement*<sup>2</sup> the parents of the living children", etc. [R. 607.]

And it was really in response to this argument that the court said:

"Therefore it had the right and it was its duty to adjudicate this case, unless the action of all of the parties except the trustee in presenting the petition

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<sup>2</sup>All italics ours, unless otherwise indicated.

to approve the compromise, divested the court of jurisdiction." [R. 608.]

"Having once acquired jurisdiction in equity, the court was not ousted thereof because of its approval of the compromise." [R. 609.]

The instant petition makes no claim whatever that such initial jurisdiction over all interests did not exist and indirectly discloses [pp. 3, 7, 8, 14, 21, 22, 26] that counsel are still contending for a divestiture as an incident to the petition for compromise. The "important question of law" here presented is defined at page 3 as "the application of the doctrine of virtual representation to a purported 'compromise' of litigation between living beneficiaries of a trust wherein the validity of the trust was attacked." At page 9 the distinction is carefully drawn when counsel say that there was error "In holding that the doctrine of virtual representation may be applied, consistently with due process of law, to a 'compromise' of pending litigation (rather than a *defense* of such litigation) where the compromise involves" etc. and at page 26, "Virtual representation does not warrant or justify living parties in *contracting* away, instead of *defending*, the interests of the unborn and absent parties." (Emphasis by author.)

Reiterating its denial that it represents the unborn contingent remaindermen (Petn. pp. 23, 28), petitioner now urges that it, Title Insurance and Trust Company, has been denied due process in that the court's jurisdiction over the unborn ceased immediately upon filing of Petition to Compromise because its unfairness robbed the life tenants of capacity for further virtual representation (pp. 14-28). Thus the constitutional question turns upon the

factual issue of unfairness of compromise, which has been found against petitioner. This is emphasized by the circumstance that initially, in responding to the Petition to Compromise, petitioner, after raising indirectly the claim of absence of indispensable parties, said this:

“This does not mean that said action should not or may not be compromised upon a fair and equitable basis if the same can be arrived at.” [R. 571.]

Predicated upon the assumption that all of these means of protecting the unborn were utterly futile, petitioner now says that it was denied due process of law because these abortive attempts to protect the unborn lacked the essentials of that guaranty. But petitioner's interest herein is only that of trustee. It does not assert that it did not have lawful notice and a full hearing, or that the judgment takes any of its property; nor does it show that it is directly affected or its property placed in imminent danger of loss or impairment. It merely asserts the fear that some day it may be held liable in its personal capacity for sums paid out of the trust pursuant to the terms of the instant decree.

**Petitioner's Fears of Personal Liability Are Fanciful.**

The attenuated nature of the claim is readily perceivable. The declaration of trust created equitable life estates for six living persons—Mr. Garland, his wife Alzoa (now Mrs. Alzoa Scott) and their four living children. Upon the death of the last survivor, the equitable remainder vests in the surviving issue (or spouses) of the four children or, failing such issue or spouses, in the “heirs at law” of Mr. Garland ascertained as of that time [R. 82]. After divorce from Alzoa, Mr. Garland

remarried. His wife, Grace Garland, and Jane Mary Garland, infant daughter of this later marriage, were and are the presumptive remaindermen in the trust and as such the owners of a vested, though defeasible, estate.

Petitioner's argument is thus built upon a series of hypotheses, namely, that the children of William and Alzoa, or some of them, will leave issue surviving all six life tenants, thus divesting the remainder estate of Grace and Jane Mary; that those grandchildren of William and Alzoa will refuse to recognize the binding effect of the instant judgment; that they will institute action against the trustee to compel restoration to the trust of the moneys paid out pursuant to the judgment; that they will be held to have had vested in them, though nonexistent, estates such as the constitution protects (see Point III, *infra*); and that they will succeed notwithstanding the fact that the judgment is binding upon the trustee and its payments made involuntarily and under the coercion of governmental authority. When and if all these things eventuate, says petitioner, it will have been deprived of its property without due process because these potential remaindermen will have been deprived of their property without due process. It is apparent that petitioner's rights are not so directly and certainly affected as to enable it to raise the constitutional question which it would now present, and by the same token it is in no position to urge the rights or potential rights of others.

**Petitioner's Actual Representation of Unborn Contingent Remaindermen.**

In this connection it should be remembered that petitioner must stand or fall upon the claim that it does not represent and has not represented the unborn contingent remaindermen at any stage of these proceedings. If it has in legal contemplation represented them, all pretense of lack of due process disappears, and petitioner so concedes. Petitioner as trustee did in fact wage a vigorous battle on their behalf in opposition to the compromise. It has repeatedly conceded its right and duty to represent them in the premises.

At R. 569 it said, in objecting to the petition for compromise:

"1. The trustee has been advised, is of the opinion, and respectfully submits to the court that it is its duty, as such trustee, to oppose any compromise or modification or revision of the declaration of trust herein the effect of which would be to injure or to impair the rights of any beneficiaries who are neither *in esse*, nor *sui juris*, nor before the court."

At R. 300 in its answer to the complaint:

"8. Denies that Title Insurance and Trust Company represents neither faction to this controversy or is made a party hereto by reason of the fact that it holds legal title to the properties covered by the declaration of trust attached as Exhibit C to the complaint. In this connection alleges that this defendant has in the past performed, and will continue to perform, its duty as trustee to uphold and maintain the integrity of the said trust evidenced by said declaration of trust, a copy of which is attached to the complaint as Exhibit C."

And in its memorandum of authorities in support of demurrer, at R. 375:

“It is the duty of the trustee to see that the rights of the remaindermen are protected. *Gray v. Union Trust Co.*, 171 Cal. 637; *Estate of Duffill*, 188 Cal. 536, 554.”

Moreover, the trustee adopted and virtually reiterated Alzoa Scott's claims concerning the merits [R. 304, 310-320] and conceded [R. 571] that its opposition to the compromise “does not mean that said action should not or may not be compromised upon a fair and equitable basis if the same can be arrived at.”

The trial court found

“that the trustee of said trust was and is before the court in this action and proceeding, and was and is subject to the jurisdiction of this court; and further that the trust property and properties is and are before and within the jurisdiction of this court for all purposes of this proceeding.” [R. 519.]

This finding was, of course, affirmed. The District Court of Appeal in its opinion said [R. 609]:

“Indeed, the trustee has consistently and vigorously and ably presented to the trial court and to this court its opposition to the judgment approving the compromise and modifying the trust. \* \* \*

“Appellant suggests that the compromise was unfair and inequitable. It should be apparent from what has already been said that it is our conclusion that

the trial court, having before it all of the facts in the case, properly held the compromise to be fair and equitable."

The instant petition confirms this actual representation of the unborn contingent remaindermen by the trustee. It says at page 8:

"Believing that the interests of the unrepresented unborn were being vitally and substantially affected by the diversion of \$120,000 of corpus to the settlor and the living beneficiaries, petitioner as trustee, not only in order to oppose the imposition upon it of a personal liability through a void judgment but also *as a matter of duty to absent beneficiaries* (Gray v. Union Trust Co., 171 Cal. 637, 639), *appeared and opposed* [R. 566] *and has continued to oppose the proposed settlement* and to contest the Court's power to order the trustee to make payments out of corpus as provided thereby."

The reference to R. 566 carries the court to petitioner's Answer to Petition to Compromise which contains the above quoted concession that the action may be compromised upon a fair and equitable basis [R. 571].

The battle waged by the trustee was and is dual in form, but in form only. First, it is urged that upon filing of Petition to Compromise the interests of the unborn ceased to be before the court because no one could represent them for the purpose of compromise, and, secondly, that the compromise could not be made because it was unfair to them. But it is immediately conceded that a fair

compromise could be sanctioned by the court, which necessarily means that there was existing jurisdiction to that end. Jurisdiction and due process are thus made to depend upon the merits of the compromise itself, and the trustee's two contentions now merge into one. Obviously it is a question of fact governed by general and state law, which was decided against petitioner. And counsel do not undertake to establish a want of evidence to support the finding. They do not attack the computations included in the Appendix hereto; they merely seize upon certain factors deemed helpful and on that basis assert a condition opposed to the findings.

We shall show that all requisites of due process were present throughout all stages of the instant proceeding and with respect to all interests in the trust, present or prospective, and that this is true when weighed in the balance of the cited cases of *Hansberry v. Lee*, and *Riley v. N. Y. Trust Co.* But there are certain preliminary considerations of a jurisdictional nature which we first advance.

I.

The Instant Petition Is Not Sufficient to Confer  
Jurisdiction.

A. The Constitutional Question Now Presented Is Not  
Shown by the Record to Have Been Raised in the State  
Court.

This court confines itself to a consideration of the specific questions which were properly raised in the state court.<sup>4</sup> And a mere general claim of denial of due process or violation of the Fourteenth Amendment is not enough; the claim must be sufficiently defined in the state court to point unmistakably to the right which is asserted here.<sup>5</sup> In case of ambiguity the opinion of the state court may be consulted in aid of its solution and this tribunal will concern itself only with the question as thus defined.<sup>6</sup>

The record at bar shows that petitioner asserted the rights of the unborn contingent remaindermen in the state courts and claimed a denial of due process as to them, while it now makes the additional claim that it, petitioner, has been denied its constitutional rights, that it has been denied due process because the unborn contingent remaindermen have been denied their rights. We are, of

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<sup>4</sup>*New York ex rel. Cohn v. Graves*, 300 U. S. 308, 317; *McGoldrick v. Compagnie Gen. Transatlantique*, 309 U. S. 430, 434-5; *Whitney v. California*, 274 U. S. 357, 362-3; *Dewey v. Des Moines*, 173 U. S. 193, 197-8.

<sup>5</sup>*Michigan Sugar Co. v. Dix*, 185 U. S. 112, 113-14; *Harding v. Illinois*, 196 U. S. 78, 85-86; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 248; *Clarke v. McDade*, 165 U. S. 168, 172; *Thomas v. Iowa*, 209 U. S. 258, 263.

<sup>6</sup>*Saltonstall v. Saltonstall*, 276 U. S. 260, 267-8; *Northwestern B. T. Co. v. Nebraska State R. Co.*, 297 U. S. 471, 473.

course, confined to the record as made by petitioner below, to the exclusion of briefs and oral argument in the state tribunals.<sup>7</sup>

The Fourteenth Amendment was first invoked by petitioner in its demurrer to the complaint as amended. With respect to the first count it was urged that:

"7. In the event that plaintiff is granted the relief sought, or any part thereof, *the property of all beneficiaries other than plaintiff, defendant Alzoo Scott, and the four living children, will be taken without due process of law* in violation of the Fourteenth Amendment to the Federal Constitution, and likewise in violation of the Constitution of California, in that it would amount to a *taking of the property of those beneficiaries who are not parties to this action without due process of law.*" [R. 362.]

An identical claim is made with respect to other causes of action [see R. 364, 365, 367, 369, 371]. The point is not mentioned in the accompanying memorandum of authorities and is given a *pro forma* complexion by the assertion therein that "It is the duty of the trustee to see that the rights of the remaindermen are protected" [R. 375], which position, supported as it is by *Gray v. Union Trust Co.*, 171 Cal. 637, *Estate of Hubbell*, 121 Cal. App. 38, and *Estate of Duffill*, 188 Cal. 536, 554, connotes right and duty of the trustee to appear for the remaindermen and hence complete jurisdiction over their interests.

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<sup>7</sup>*Lynch v. New York ex rel. Pierson*, 293 U. S. 52, 54; *Live Oak etc. Assn. v. R. R. Com.*, 269 U. S. 354, 358; *Zadig v. Baldwin*, 166 U. S. 485, 488.

Petitioner's answer to the complaint as amended incorporates a Tenth Affirmative Defense containing this:

"All beneficiaries of said trust are indispensable parties to this suit whereby plaintiff prays for a cancellation and rescission of the said trust. Any proceeding herein, or otherwise, which would result in terminating or *affecting the rights of any of said beneficiaries* not joined as parties herein would violate the Constitution of the United States, and particularly the Fourteenth Amendment thereto, as well as violating the Constitution of the State of California, article I, section 13." [R. 404.]

The District Court of Appeal construed the plea as relating to the rights of the remaindermen. It said:

"By appropriate pleadings, representations to the trial court, and notice of appeal, the trustee, Title Insurance and Trust Company, has raised the principal question involved in this appeal, i. e., by judgment of the court modifying the trust, *was property of unborn contingent remaindermen taken without due process of law?*" [R. 603.]

The state court record discloses no claim that petitioner has been deprived of its own property without due process or that there has been any such derivative violation of fundamental rights as is now claimed. It seems manifest that a litigant cannot rely upon the constitutional rights of others throughout the state court proceeding and then evolve, for purpose of review by this court, a new and attenuated theory of denial of his own constitutional rights. If they were involved, that matter should have been presented by the pleadings to the state court.

But petitioner has not shown that its own interests are directly involved or confronted with any immediate danger of impairment.

**B. Petitioner's Interests Are Not Directly Involved in Such Manner and Degree as to Entitle it to Raise the Question of Due Process Which It Now Advances.**

It is elemental that a petitioner for certiorari cannot rest upon a violation of the rights of others and that he must show that he himself has sustained or is immediately in danger of sustaining some direct injury as a result of the ruling of which he would complain.<sup>8</sup>

Petitioner-trustee expressly disclaims any representation of the interests of the contingent remaindermen and now asserts a derivative denial of its own rights because their rights have been denied. Viewed in any other light the petition herein amounts to a concession that the trustee has represented them throughout, a negation of petitioner's basic contentions: it would spell due process afforded these remaindermen through the trustee's representation of them.

Only in the event of birth of grandchildren of William J. Garland and Alzoa Garland (Scott) and their surviving all six life tenants, with a resultant defeasance of the equitable remainder now vested in Grace Garland and Jane Mary Garland, could there be any possible threat to petitioner. And only in the further event of the surviving grandchildren asserting and establishing that they were while *in caelo* owners of vested interests protected

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<sup>8</sup>*Liberty Warehouse Co. v. Burley etc. Assn.*, 276 U. S. 71, 88; *Hendrick v. Maryland*, 235 U. S. 610, 621; *Massachusetts v. Mellon*, 262 U. S. 447, 1085; *Oliver Iron M. Co. v. Lord*, 262 U. S. 172, 180; *Public Utilities Com. v. Landon*, 249 U. S. 236, 246; *Ashwander v. Tenn. Valley Authority*, 297 U. S. 288, 347-8 (Mr. Justice Brandeis' dissent); *City of Allegan v. Consumers' Power Co.*, 71 Fed. (2d) 477, 482 [Cert. denied 293 U. S. 586]; *Lehon v. Atlanta*, 242 U. S. 53, 56.

by the Fourteenth Amendment (see Point III, *infra*) and hence that the judgment does not bind their interests would there be any substantial threat to petitioner's property or rights.

"To complain of a ruling, one must be made the victim of it. One cannot invoke, to defeat a law, an apprehension of what might be done under it, and which, if done, might not receive judicial approval." (*Lehon v. Atlanta*, 242 U. S. 53, 56.)

In *City of Allegan v. Consumers' Power Co.*, 71 Fed. (2d) 477, 482 (cert. den. 293 U. S. 586), the court said concerning a similar attempt to pyramid speculations as to future events:

"These assumptions are based upon speculations, and the threatened injury to the utility is so remote that it is difficult to recognize that it is immediately in danger of sustaining some direct injury."

Any possible threat to petitioner's rights would be a pale and puny thing, for the trustee could not be held liable to beneficiaries for payments made under the sanction and coercion of an order of a court having jurisdiction over the trustee [expressly found at R. 519].

The instant decision establishes as a matter of state law that the personal presence of the unborn is not necessary to jurisdiction over their interests; that they are vicariously before the court through virtual representation, through the presence of Mr. Mathes as guardian *ad litem* for such interests, and perhaps through the trustee's own presence; also that the judgment is binding upon the trustee and that it must obey the same. The decree says: "that the defendant, Title Insurance and

Trust Company, as trustee of said trust, should be instructed and directed to act and perform its duties in conformity with said declaration of trust as so modified, reformed and revised" [R. 521], and specific order to this effect follows [R. 522]. The least that can be said is that the state court ruling conclusively establishes that the contingent remaindermen are not indispensable parties to the litigation and that therefore the judgment binds the trustee regardless of its effect upon the remaindermen.

Even if the state court were in error as to the binding effect of its decree upon the interests of the remaindermen, it would nevertheless be true that the judgment binds the trustee and that petitioner in its trust capacity makes the specified payments under compulsion.

A court of equity in its capacity of universal trustee has inherent power to direct the conduct of persons occupying that conventional relation and subject to its jurisdiction; and the corollary is that such orders afford full protection to the trustee who obeys the same.<sup>9</sup> Indeed, "Failure of the trustee to obey a court order concerning the administration of the trust is nearly always considered a ground of removal" (3 Bogert on Trusts and Trustees, Sec. 527, p. 1666). Should it be ultimately held that the unborn contingent remaindermen are not bound by the instant judgment, the trustee's payment would fall in the same category as any loss of assets occurring without its fault, as for instance through fire, flood, act of God

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<sup>9</sup>See *Restatement of the Law of Trusts*, Sec. 201, comment a, p. 531; 2 *Scott on Trusts*, Sec. 201, p. 1085; 4 *Pomeroy's Equity Jurisprudence* (5th Ed.), Sec. 1064, pp. 179-180.

or other form of *vis major*. The trustee is liable for payments made or losses suffered when some degree of fault attaches to it and not in those instances where the loss occurs through controlling and unavoidable circumstances.<sup>10</sup>

**C. The State Court Decision Is Based Upon Independent and Adequate Grounds of General or State Law Which Preclude Any Examination of the Federal Question Which Petitioner Would Raise.**

As already shown, petitioner's real insistence was and is that the compromise is unfair to the unborn contingent remaindermen because it places the entire burden upon them and confers the whole benefit upon the life tenants, thus disqualifying the latter for virtual representation and leaving no other jurisdictional avenue open. But petitioner's concession that there was original jurisdiction over the interests of the unborn through virtual representation by the life tenants, coupled with the contention that such jurisdiction was divested because of alleged unfairness of the compromise with respect to the contingent remaindermen, leads inevitably to the conclusion that this case deals primarily, if not exclusively, with a matter of state or general law rather than one of Federal cognizance. For, upon petitioner's own argument there would be no divesting of jurisdiction if no conflict arose between life tenants and remaindermen,—in other words, if the burden of the compromise were borne equally by

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<sup>10</sup>See 2 *Scott on Trusts*, Sec. 204, p. 1096; *Restatement of Trusts*, Sec. 204; *Restatement of Law of Restitution*, Sec. 73; 2 *Perry on Trusts and Trustees* (7th Ed.), Sec. 924, p. 1572; *Estate of Cousins*, 111 Cal. at 451.

both classes of interests. When the state courts found that such was the case, that ended the litigation according to petitioner's own argument. The trial court so found at R. 520-21 and the Court of Appeal at R. 606, 609.

This question having been decided against petitioner (rightly or wrongly), other questions, such as the state court's jurisdiction to appoint a guardian *ad litem* for the unborn or the actuality and legality of the representation of their interests by the trustee, become immaterial in this court.

As petitioner's Federal question hinges upon a favorable determination of the general question of hostility in fact between virtual representatives and the represented, this case comes squarely within the purview of *Enterprise Irr. Dist. v. Farmers Mutual Canal Co.*, 243 U. S. 157, 163-66, and *Fox Film Corp. v. Muller*, 296 U. S. 207, 210.

We have shown, we think, that no Federal question was necessarily presented by the record made by petitioner at bar. It is true that the District Court of Appeal stated in an introductory way the existence of a question of due process [R. 603], but had it gone further and decided the point as one of Federal constitutional significance rather than general law, that would have had no effect in this court unless the constitutional question was necessarily involved. State courts cannot thus confer jurisdiction upon this court.<sup>11</sup>

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<sup>11</sup>*Lynch v. New York ex rel Pierson*, 293 U. S. 52, 54.

Unless the record affirmatively shows the Federal question to be necessarily involved and the case not adequately determined upon non-Federal grounds, jurisdiction in this court does not exist, for "jurisdiction cannot be founded upon surmise" (quoting the *Lynch* opinion). The opinion below scarcely raises a surmise of the determination of a Federal question, for the District Court of Appeal, after stating the existence of the question,—“was property of unborn contingent remaindermen taken without due process of law”—(without any specific mention of the Federal Constitution),<sup>12</sup> proceeded to discuss and decide the matter as one of general and state law, making no reference whatever to petitioner's reliance upon *Hansberry v. Lee*, *supra*. Clearly the decision rests upon independent and adequate non-Federal grounds and there is no jurisdiction to review it in this court.

But, in any event, the petition should be denied because the so-called Federal question raised herein does not possess sufficient substantiality to warrant interposition of this court.

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<sup>12</sup>Art. I, Sec. 13 of the California Constitution provides that no person shall “be deprived of life, liberty or property without due process of law.” See *Bowe v. Scott*, 233 U. S. 658, 664-5.

II.

**The Instant Petition Presents No Federal Question of Substantiality.**

“The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject.” (*California Water Service Co. v. Redding*, 304 U. S. 252, 255.)

The opinion of the District Court of Appeal establishes conclusively<sup>13</sup> what the jurisdiction of the California court is with respect to the interests of unborn contingent remaindermen in trusts under its control and how such jurisdiction is to be exercised. It establishes that the California courts have inherent power to appoint a guardian *ad litem* to protect such interests against an attempt to destroy the trust or in order to preserve it through compromise [R. 608].<sup>14</sup> This decision also establishes that the doctrine of virtual representation applies as between life-tenant-parent and his or her unborn child who may possibly become a contingent remainderman when there is no actual hostility or diversity of interest between the potential parent and the possible child [R. 605-7]. In other words, California law recognizes two different

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<sup>13</sup>*Enterprise Irr. Dist. v. Farmers Mutual Canal Co.*, 243 U. S. 157, 166; *Federal Union Trust Co. v. Field*, 311 U. S. 169, 177-8; *United Gas etc. Co. v. Texas*, 303 U. S. 137, 139-41.

<sup>14</sup>If any implementation of this inherent jurisdiction were needed, it would be found in Sec. 187, C. C. P. which is quoted at page 6 hereof, for equity jurisdiction in California flows from Constitutional grant. *City of Pasadena v. Superior Court*, 157 Cal. 781, 793.

methods of protecting the potential interests of the unborn without sacrificing those of the living.

The opinion indicates that the court, had it considered a decision necessary, would probably have upheld respondent's contention that the trustee (petitioner) had a right and duty to represent those contingent remaindermen [R. 609] as it properly should under the authorities cited in petitioner's demurrer to the plaintiff's complaint as amended [R. 375].<sup>15</sup>

Denial of due process could be found at bar only if this court should hold with respect to all three methods of protecting the interests of the unborn that "It cannot be said that the procedure adopted fairly insures the protection of the interests of absent parties who are to be bound by it" (quoting *Hansberry v. Lee*, 311 U. S. at p. 42). If any one of the three methods of representation passes this test, there is no Federal question left.

We include trustee representation in this assertion because the existence of a Federal question is itself a Federal question to be determined independently by this court<sup>16</sup> and the failure of the state court to decide the legal sufficiency of trustee representation will become immaterial if this court finds that such representation accords with the requisites of due process.<sup>17</sup> By this we mean to say that if guardianship and virtual representation should fail to meet the test of due process, there nevertheless could

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<sup>15</sup>*Gray v. Union Trust Co.*, 171 Cal. 637; *Estate of Duffill*, 188 Cal. 536, 554.

<sup>16</sup>*Honeyman v. Hanan*, 300 U. S. 14, 18.

<sup>17</sup>*Cf. Lawrence v. State Tax Commission*, 286 U. S. 276, 282; *Chapman v. Goodnow's Administrator*, 123 U. S. 540, 548.

be no holding of a denial of that constitutional right if this court should find, as here, that in fact there has been complete representation by the trustee and that it supplies in legal contemplation the measure of protection prescribed by the *Hansberry* decision. That such would be the proper holding follows from *McArthur v. Scott*, 113 U. S. 340, and the later case of *Miller v. Texas & Pacific Co.*, 132 U. S. 662, 671, which explains that it was the absence of a trustee that caused reversal of the *McArthur* judgment.

**Representation of the Interests of the Unborn Contingent Remaindermen by a Guardian Ad Litem Especially Appointed for the Purpose Supplies All the Requisites of Due Process.**

Petitioner's claim that virtual representation is the exclusive expedient for protecting the interests of the unborn finds no support in the authorities cited at page 17. But if it were true that protection of the interests of the unborn through a guardian *ad litem* had not been heretofore sanctioned, that fact would not raise a constitutional barrier to the devising of new methods of representation by the State of California.

These questions fall within the ambit of state policy,<sup>18</sup> especially as they pertain to the jurisdiction and procedure of the state courts. The State of California "is free to regulate the procedure of its courts in accordance with

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<sup>18</sup>*Missouri v. Lewis*, 101 U. S. 22; *Cincinnati Street Railway Co. v. Snell*, 193 U. S. 30, 36; *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U. S. 511, 517; *Truax v. Corrigan*, 257 U. S. at 373-4, dissenting opinion of Mr. Justice Brandeis; *Ex parte Converse*, 137 U. S. 624, 631-3; *Twining v. New Jersey*, 211 U. S. 78, 106.

its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. (Citing cases.) Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." (Mr. Justice Cardozo in *Snyder v. Massachusetts*, 291 U. S. at 105.)

*Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, 296:

"But we do not have revisory power over state practice, provided such practice is not used to evade constitutional guaranties."

Mr. Justice Black, dissenting in the same case, said:

"In addition, I deem it essential to our federal system that the states should be left wholly free to govern within the ambit of their powers. Their deliberate governmental actions should not lightly be declared beyond their powers. For us to shear them of power not denied to them by the federal constitution would amount to judicial usurpation." (p. 302)

*Hansberry v. Lee*, 311 U. S. at 42:

"Here, as elsewhere, the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits; \* \* \* nor does it compel the adoption of the particular rules thought by this court to be appropriate for the federal courts."

The District Court of Appeal well said concerning the rule of indispensable parties:

"The reason behind the exception is a simple one of human relationships, implicit in the principle that human laws, and all other temporal things, are for the living; not for the dead or for those not yet in being, if to hold otherwise would result in injustice to living persons. Because parties are not in being, and therefore cannot be brought before the tribunal, is not sufficient reason for a court to stand by, helpless and impotent, when rights of living persons, in ordinary common sense, ought to be adjudicated." [R. 604.]

And its finding [R. 608] that the inherent equity power of the Superior Court was properly exercised through the appointment of Mr. Mathes as guardian *ad litem* does not establish a rule peculiar to California.

The Restatement of the Law of Property (Future Interests) contains this caveat under Sec. 182 at page 734:

"The Institute takes no position as to whether the general power of equity includes power apart from statute, to appoint a guardian *ad litem* for the interests limited in favor of unborn persons and thereby to permit a judicial proceeding to become binding as against such interests."

And it is explained at page 220 of Tentative Draft No. 5 dated March 15, 1934, referring to what was then Section 224. After discussing the state of the English and American decisions and statutes, and pointing to the paucity of authority, the comment concludes as follows:

"The powers of equity have shown such expandability in the past for the meeting of newly realized

needs that it does not seem wise on the existing state of authority to deny the existence in equity of power to appoint a guardian *ad litem* to represent the interests limited in favor of unborn persons. The Caveat to Comment *e* leaves this as a possible growing point for the future."

The Fourteenth Amendment neither commands<sup>19</sup> nor forbids change or growth<sup>20</sup> in a state's substantive or adjective law. Such growth has been taking place and all in a single direction. Numerous states have adopted the expedient of a guardian or trustee for furnishing representation to the unborn, some through an exercise of inherent equity power and others through statutory enactment.<sup>21</sup>

Massachusetts, whose courts have no inherent equity power and must depend entirely upon statute for the source of jurisdiction (see 5 Law Q. Rev. pp. 370, 384-6), has upheld such legislation upon considerations which are equally applicable to the exercise of the same power by courts needing no such aid. The constitutionality of such a statute was specifically upheld in 1862 in *Clarke v. Cordis*, 4 Allen 466, 474-6, and its philosophy, expressed before the enactment of the Fourteenth Amendment, was held in *Copeland v. Wheelright*, 230 Mass. 131, to be equally applicable thereto.

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<sup>19</sup>*Ownbey v. Morgan*, 256 U. S. 94, 112.

<sup>20</sup>*Twining v. New Jersey*, 211 U. S. at 101, 106.

<sup>21</sup>It is immaterial, of course, whether the state speaks through its legislature or its courts in defining its general law. See *Eric R. Co. v. Tompkins*, 304 U. S. at 78.

A like representation under statutory authority was upheld in *Gunnell v. Palmer*, 370 Ill. 206. If statutory basis for the appointment were needed, it would be found in Section 187 of the California Code of Civil Procedure, which is quoted *supra*; it implements the constitutional grant of equity power to the Superior Courts (Const., Art. VI, Sec. 5).<sup>22</sup>

And the validity of such appointments in the exercise of inherent equity power has been specifically adjudicated in *Lewis v. McConchie*, 151 Kan. 778; *Ward v. Ward*, 153 Kan. 222; *Robinson v. Barrett*, 142 Kan. 68; *Lyman v. Lyman*, 293 Pa. 490.

Sec. 182 of the Restatement says:

"A judicial proceeding has binding effect as against the future interest limited in favor of a person who was unborn at the time of the commencement of such proceeding when the requirements stated in some one of the Clauses of this Section are satisfied, but not otherwise; \* \* \* (b) Such person was duly represented by a guardian *ad litem* appointed to protect the interests limited in favor of unborn persons."

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<sup>22</sup>The growing use of this type of representation argues its consonance with modern and enlightened concepts of due process. See Cal. Land Title Law (1915), Sec. 13, quoted in Petition footnote on page 4; Uniform Trustees' Accounting Act (1936), Sec. 9 (9 U. L. A., p. 706); Soldiers and Sailors Civil Relief Act of 1940, Sec. 200, Subd. 3 (50 U. S. C. A., App., Sec. 520, Subd. 3, p. 116).

The court itself protects the interests of the unborn in proceedings on the probate side concerning testamentary trusts. Cal. Prob. Code, Sec. 1123: "A decree rendered under the provisions of this Chapter, when it becomes final, shall be conclusive upon all persons in interest, whether or not they are in being"; and see *Ringwalt v. Bank of America etc. Assn.*, 3 Cal. (2d) at 685.

The instant decision conclusively establishes that the California court has inherent power to appoint such a guardian *ad litem* (see footnote 18, *supra*). We are thus within the exact rule of the Restatement, whose purpose is "to state the existing principles of the common law as they have been developed by the courts up to this time" (The Restatement in the Courts, 4th Ed., p. 9).

"It purports to accurately reflect the general common law of the United States, and where there is a conflict, to state the general and better rule on any given subject." (*Canfield v. Security-First National Bank*, 13 Cal. (2d) 1, 31.)

The record shows that Mr. Mathes testified to the fairness of the compromise and argued and cited authorities in support thereof [R. 538]. The trial court found:

"that all persons interested or who at any time in the future may or might be or become interested in said trust referred to and described in said petition to compromise and in its assets and properties, including the unborn and unknown remaindermen thereof, were and are duly and regularly represented and protected in this action and proceeding, and were and are before the court for all purposes thereof, and were and are virtually and actually represented therein." [R. 519.]

And the appellate court:

"The answer to this argument is equally persuasive. It is that courts may be safely entrusted with the protection of rights of unborn remaindermen. And it is in cases of this sort, in which there is jurisdiction in equity of the controversy, that such rights are protected by the courts themselves. In the present case we can confidently assume that this duty was performed by the trial court." [R. 608.]

We submit that this representation of the unborn in and of itself supplied all the requisites of due process as defined in the *Hansberry* or any other applicable decision.

We do not rely upon the appointment of the guardian *ad litem* to create jurisdiction over the interests of the unborn, as contended at Petition page 25. We have shown that it concededly existed prior to filing Petition to Compromise and that the guardianship was then adopted as one of three methods of effectuating full and fair representation of those interests. But if it were true that this appointment was a means of acquiring jurisdiction, that would be immaterial, for Sec. 187 C. C. P. has been held to sanction new devices for obtaining jurisdiction over the interests of persons interested in pending proceedings.<sup>23</sup>

**The Application at Bar of the Doctrine of Virtual Representation Constituted Due Process.**

**Absence of Hostility, Not Identity of Motives, Is the Test.**

The California courts have here applied the rule of Restatement concerning virtual representation. It says in Sec. 184 that the necessary prerequisites for representation of the unborn exist when the party to the action "(d) has an estate for life in land<sup>24</sup> and the limitation of the interests subsequent to such estate for life is in favor

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<sup>23</sup>See *Estate of Smith*, 4 Cal. App. (2d) 548; *State v. District Court*, 90 Mont. 213, 221-2.

<sup>24</sup>Subdivision (e) makes the same rules applicable to personalty.

of unborn issue of the person joined." Comment f at page 745 is as follows:

"f. Rationale of Clause (d). Under the rule stated in clause (d) the owner of an estate for life is permitted to represent the interests of his unborn issue. The fact that the representative has only an estate for life tends to make the protection accorded through such a representation less substantial than in the situations described in other clauses of this section. This fact is offset, however, by the fact that a parent having a small interest in his own right normally can be depended upon to defend adequately the interests also limited to this issue. In this combination of circumstances rests an assurance of protection at least equal to that furnished by the more substantial interest had by the representative under the other clauses of this section."

Sec. 185 of the Restatement says:

"The conduct of the person joined as a party constitutes the 'sufficient protection' required in Sec. 181(b) (iv) and Sec. 183(c) for the representation of living or unborn persons *whenever it does not appear affirmatively that such person acted in hostility to the interest of the person claimed to have been represented by him.*"

Comment b, at page 747, develops the thought of necessary affirmative showing of hostility as follows:

"The sufficiency and effectiveness of a representation are not necessarily diminished by proof that facts and contentions not brought forth by the representative would have caused a different judgment or decree more beneficial to the interest of the person represented. Evidence as to either the inactivity of

the representative or the inadequacy of his conduct is material only as it conduces to establish the hostility of the conduct of the representative to the interest of the person represented. The binding force of the judgment, decree or other result is not impugned by proof that the representative was negligent, or unaware of the effective mode of procedure for the protection of the interests limited in favor of himself and of the represented person."

This exposition of the law does not square with petitioner's contention at page 19 that "It is not sufficient that the parties have no direct hostility toward each other. *It is imperative that they must have the same impelling reasons for acting.*" (Emphasis by author.)

Professor Roberts' article, cited at Petition page 17, says at page 591:

"The true rule would seem to be that, given the requisite community of interest (which includes absence of actual adverse interest in the particular proceeding), the absent members of the class are bound by the appearance of the representative, whatever the extent of his activities in the conduct of the litigation, so long as they are not affirmatively hostile to the interests represented."

**An Ancient and Uniformly Recognized Procedure.**

The rule thus defined is the established standard. It accords with that already prevailing in California (*Gorman v. Russell*, 14 Cal. 531, 539; *County of Los Angeles v. Winans*, 13 Cal. App. 234; *Curran v. Pecho Ranch & Stock Co.*, 95 Cal. App. 555) and is a time-honored procedure. See *Reynoldson v. Perkins*, at page 61, *infra*. The doctrine of virtual representation was

developed as early as the year 1701 (see Notes in Ann. Cas. 1913C, p. 65, and 2 Ann. Cas. 790). It has been repeatedly recognized and applied in the Federal Courts.<sup>25</sup>

But counsel would create a constitutional question out of asserted error in a rule which has prevailed for over two hundred years, forgetting that the Fourteenth "amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had."<sup>26</sup> Indeed, the very antiquity of the rule establishes its harmony with due process.

Mr. Justice Holmes, deciding a party wall controversy under the laws of Pennsylvania,<sup>27</sup> said:

"The 14th Amendment, itself a historical product, did not destroy history for the states, and substitute mechanical compartments of law, all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the 14th Amendment to affect it, as is well illustrated by *Ownbey v. Morgan*, 256 U. S. 94, 104, 112, 65 L. Ed. 837, 843, 846, 17 A. L. R. 873, 41 Sup. Ct. Rep. 433." (p. 31)

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<sup>25</sup>*Smith v. Swormstedt*, 16 How. 288, 302-3; *Knotts v. Stearns*, 91 U. S. 638; *McArthur v. Scott*, 113 U. S. 340; *Miller v. Texas & Pacific R. Co.*, 132 U. S. 662; *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356, 366-7; *Hartford L. Ins. Co. v. Ibs*, 237 U. S. 662, 666, 672.

<sup>26</sup>*Minor v. Happersett*, 88 U. S. 162, 171.

<sup>27</sup>*Jackman v. Rosenbaum Co.*, 260 U. S. 22.

The cited case of *Owenbey v. Morgan* dealt with the Delaware attachment statutes. Concerning the matter now in hand, the opinion said:<sup>28</sup>

"A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the states as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law, \* \* \*.

"However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the 14th Amendment furnishes a universal and self-executing remedy."

**Intrinsic Fairness of the Virtual Representation at Bar.**

The California courts have found as a fact an absence of disqualifying hostility or adverse interest. When we consider that the infant life tenants, who were held to be competent virtual representatives, were not acting for themselves but through Mr. Hartke as guardian appointed by the court, the adequacy of the representation of the unborn becomes increasingly clear, for Mr. Hartke, as guardian *ad litem*, could only recommend a compromise to the court; he could not make it himself; the compromise at bar was made on their behalf by the court and the court alone.

Manifestly there was no possible incentive for the court or its agent, the guardian, to neglect the interests of the remaindermen in passing upon this compromise, remaindermen who now exist only in the loins of the

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<sup>28</sup>256 U. S. at 111-12.

life tenants. The basic philosophy of virtual representation is this: That the presence of one whose interests are such that he will normally advance the interests of the absentees in the same manner and to the same degree as his own, operates as an adequate protection of the interests of the absentees and therefore serves as a vicarious presence on their part. Certainly the status of Mr. Hartke as guardian *ad litem* in the instant situation fully measures up to this basic criterion.

Mr. Hartke and Mr. Mathes testified

“that in their opinion and in the opinion of each of them the proposed compromise was to and for the best interests of the minors and other persons, born or unborn, in whose behalf they, the said witnesses, respectively, appeared, actually or purportedly, as guardians *ad litem*.” [R. 538.]

and both of them “argued and cited authorities in favor and in support of said petition to compromise” [R. 538].

The soundness of their opinion is exemplified by a fact which petitioner stresses. Under the trust as drawn there would be a presumptive hiatus of thirteen (or eleven)<sup>28a</sup> years during which the children of Mr. and Mrs. Garland would receive no income whatever (see Petn. p. 20); under the compromise receipt of 25% of the income during that entire period was assured to these life tenants; but that change also inured to the benefit of issue of a

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<sup>28a</sup>See pages 45, 49, *infra*.

deceased life tenant, for such issue would be otherwise without any income during that period just as his parent would have been [R. 76]. Alzoa May was sixteen years old [R. 543]; should she die at the end of the twenty year period, at age twenty-eight (through influenza, bombing, child birth or other cause), leaving issue, the latter would enjoy or miss the assured income over the following eleven (or thirteen) year period depending upon the consummation or the rejection of the compromise. And this change was urged in the petition as a benefit to the "minor children of plaintiff and said defendant Alzoa Scott, *and their successors*" [R. 555], obviously referring to issue as "successors".

The compromise was necessarily made upon the basis of the parties' best appraisal of the unknown and unknowable events of the future. They could deal only in probabilities and possibilities. The probabilities could be best weighed in the light of the past and the future measured according to experience, namely, the American Experience Table of Mortality or similar experience table. A consideration of the prospective results of the compromise, viewed in the light of the then existing probabilities and possibilities, abundantly sustains the court's finding in the premises.<sup>29</sup>

It was stipulated that the book value of the corpus of the trust as of September 20, 1939, was \$1,193,824.29

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<sup>29</sup>In the interests of simplicity and clarity we have omitted mention of surviving spouses of issue of William and Alzoa.

[R. 537]. The appellant's return to the petition to compromise averred that "The income from the trust over the last eighteen months has averaged approximately \$2300 per month" [R. 569].<sup>80</sup>

Assuming a trust worth \$1,200,000, yielding \$2300 per month, the trust had an annual net income of \$27,600 (or 2.3%)<sup>81</sup> which would be distributed as follows:

UNDER ORIGINAL TRUST.

	First 5 Years	Second 5 Years	Third 5 Years	Fourth 5 Years	After 20 Years
Alzoa	\$15,000	15,000	15,000	15,000	15,000
Four children	6,000	7,200	9,000	12,600	0
William J.	6,600	5,400	3,600	0	12,600

UNDER COMPROMISE.

On basis of 2.3% the trust of \$1,080,000 (\$1,200,000 minus \$120,000) would yield an annual income of \$24,840, of which

Alzoa	would get	\$9,315
Four children	would get	6,210
William J.	would get	9,315

The computations mentioned in the opinion below and reproduced in the Appendix hereto are based in part upon admissions in the state court briefs. We assume

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<sup>80</sup>This is an admission which binds the trustee and renders it eminently fair to adopt its figure as an income basis for appraising the future. (20 Am. Jur., Sec. 630, pp. 532-3; 10 Cal. Jur., Sec. 310, p. 1062.) True, it was not known that the income would not vary but we are dealing with probabilities and the continuity of an income fixed for eighteen months is as stable a factor as any other which must be taken into consideration.

<sup>81</sup>There is no factual basis for petitioner's argument (Petrn. p. 18) built upon an assumed rate of 4%.

an expected duration of the trust for 48 years because the youngest child was at the time of the compromise eleven years of age [R. 543] and his expectancy, according to the American Table, was 48.08 years. It may be that the joint expectancy of the four children was longer than that, but 48 years fairly serves the purpose in hand. We have assumed for Mr. Garland an expectancy of 23 years. Mr. Hartke in his brief as guardian *ad litem* asserted that Mr. Garland died in July, 1940, at the age of 47 years; this was shortly after the compromise hearing [November 1, 1939; R. 516] and the expectancy at age 47 is 23.08 years. The petition herein gives 25 years (p. 20). We have adopted 23 years as a fair expectancy under the circumstances.

The results of varying assumptions are as follows:

1. Assuming that Mr. Garland lived his full expectancy of 23 years from date of compromise, that Alzoa and the four children survived him, which seems to be the normal assumption, it appears that the four children, the life tenants, would ultimately surrender \$294,570 through the compromise, while the unborn remaindermen would give up but \$120,000.<sup>32</sup>

2. If it be assumed that Alzoa dies at the end of 12 years from the compromise date but that William lives his full 23 year expectancy, the four children would surrender through compromise \$178,980, as contrasted with the remaindermen's \$120,000.

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<sup>32</sup>The method of reaching the various results here stated is set forth in the series of examples incorporated in the Appendix to this Brief.

3. If both Alzoa and William had lived 13 years after the date of compromise, the four children would have received under the compromise and during the remaining 35 years of the presumptive term of the trust \$422,625 less than they would have received under the original trust, while the remaindermen yielded \$120,000 which would not be coming to them for 48 years. The children would thus surrender \$12,075 a year or an annuity of that amount. The present worth of such an annuity on a  $2\frac{1}{2}\%$  basis for a term of 35 years is \$279,477.08, while the present worth of a flat sum of \$120,000 due 35 years hence is \$50,564.40 on a  $2\frac{1}{2}\%$  basis.

4. Upon the hypothesis that William dies immediately after the compromise and that Alzoa survives the entire 48 year trust expectancy, the four children would give up by way of compromise \$306,720 as against the remaindermen's \$120,000; and in that event William's death would have immediately increased the corpus to the extent of \$174,950 [R. 537] or \$54,950 more than the remaindermen surrendered.

This \$306,720 is the aggregate amount of an annuity of \$6390 for a period of 48 years surrendered by the four children. Such an annuity on a  $2\frac{1}{2}\%$  basis has a present worth of \$174,170.74, while the present worth of \$120,000 due in 48 years (at  $2\frac{1}{2}\%$ ) is \$36,680.52.

5. Assuming the immediate death of William and continued life of Alzoa for 10 years thereafter, the four children would surrender, through compromise, income aggregating \$522,750, to be compared with the remaindermen's \$120,000.

6. Assuming William's immediate death and Mrs. Scott's survival for a period of 20 years after the compromise, the four children would yield \$465,900 in income through the compromise, while the remaindermen would yield but \$120,000.

7. Assuming that Alzoa dies immediately after the compromise but that William lives his full 23 year expectancy, the four children would then surrender income aggregating \$67,200 under the compromise, while the remaindermen give up \$120,000. This is the only instance in the seven examples in which the children would surrender less than the potential grandchildren.

8. The eighth example of the Appendix illustrates the working of the compromise with respect to the issue of a deceased child.

**Alzoa Scott Was Competent to Represent Her Unborn Grandchildren  
in the Compromise Proceeding.**

Though the District Court did not find it necessary to pass upon the point [R. 605], Mrs. Scott remained throughout the proceeding a competent virtual representative of the unborn contingent remaindermen. Actually the compromise contains in it no element hinting at affirmative proof "that such person acted in hostility to the interest" of the unborn which is required by Sec. 185 of the Restatement. Nor does the record lend any support to the claim that Mrs. Scott "raided the interests of the unborn" (Petr. p. 19).

In the first place (disregarding for the moment the \$60,000 cash which she is to receive), Mrs. Scott surrendered income amounting to \$5685 a year (the difference between \$15,000 and \$9315). In 23 years this

would amount to \$130,755, or more than \$10,000 in excess of the remaindermen's contributions. If she should live 40 years her surrender of income would amount to \$237,400.

Secondly, she rendered her grandchildren as well as her children a tremendous service in negotiating a compromise which would eliminate the presumptive hiatus of 11 years in income,<sup>33</sup>—the 20 year period for fixed income to children and their issue would elapse in 1951 and Mr. Garland's expectancy would expire in 1962. As appears from First Example in the appendix it is fair to assume that during this 11 year period the four children or their issue would receive \$68,310 under the compromise as opposed to no income whatever under the original trust.

So far as concerns the \$60,000 cash to Mrs. Scott, for approximately two years she actively conducted the defense of the trust against an attack seeking to completely destroy it (the trustee was insistently contending that it did not represent the remaindermen), and indeed for another year and a half after Mr. Hartke's appointment as guardian *ad litem* for the children she continued to actively resist the attack of the plaintiff. While the court reserved jurisdiction to award expenses and attorneys' fees to the trustee and to the guardians *ad litem* [R. 528], no such reservation was made for the benefit of Mrs. Scott. Normally the expense of the defense of such an action should be paid out of corpus (*Estate of Gartenlaub*, 185 Cal. at 655). And indeed Mrs. Scott

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<sup>33</sup>Petitioner gives it a duration of 13 years (p. 20).

is not through with her burden, for the trustee by filing the instant petition has added additional expense to Mrs. Scott as well as to others. Considering the value of the subject matter, the intricacy of the questions involved and the unremitting zeal of the trustee in opposition to the compromise, it seems but a fair inference that Mrs. Scott will realize for herself no part of the \$60,000 and that it will be consumed in costs of litigation.

Nor is it improbable that this litigation, pursued to the bitter end by the trustee, may require her to invoke the provisions of Section 8 of the trust [R. 79], whereunder the trustee is *obligated*, should she "be in want of additional moneys for expenses of accident, illness and/or other misfortune," to disburse to her such portion of the corpus as may be necessary to meet her want not exceeding \$50,000.00

**Fact of Compromise Does Not Preclude Virtual Representation.**

The claim at petition page 27 that *County of Los Angeles v. Winans* holds that virtual representation cannot concur with a consent judgment or a compromise is misplaced; and this is established as a matter of state law by the decision of the District Court of Appeal in this case. The language of the *Winans* decision is confusing but it was satisfactorily explained to the state courts and shown to be opposed to the actual holding in *Curran v. Pecho Ranch and Stock Co.*, 95 Cal. App. 555, wherein the point, though not discussed in the opinion, was elaborately argued in the briefs and the court held the virtual representation to be sufficient notwithstanding the fact of default.

Comment b to Sec. 185 of the Restatement says at page 746:

"The representative may have been an infant or a lunatic. The representation can be as effective when the representative defaulted in the judicial proceeding as when he contested such proceeding with great vigor. *The representation also can be effective when the representative consented to the judgment, decree or other result reached in the judicial proceeding.*"

And the California annotation at page 126 says:

*"A default suffered by the guardian ad litem for living minor remaindermen will be binding upon unborn remaindermen where the latter are sufficiently represented by those in being. Curran v. Pecho Ranch & Stock Co. (1928), 95 Cal. App. 555, 273 P. 126."*

**Hansberry and Riley Decisions Afford No Support to Petitioner's Contentions.**

Even if it were concluded that the California courts erred in applying the rule of virtual representation, factually or otherwise, that would not amount to a denial of due process, for "the 14th amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions \* \* \* any more than, in guaranteeing due process, it assures immunity from judicial error \* \* \*." (*Milwaukee etc. Co. v. Wisconsin ex rel. Milwaukee*, 252 U. S. at 106.)<sup>84</sup>

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<sup>84</sup>See, also, *Riley v. Worcester County Trust Co.*, 89 Fed. (2d) 59, 66; *Neblett v. Carpenter*, 305 U. S. 297, 302; *Bell Tel. Co. v. Penn. P. U. Com.*, 309 U. S. 30, 32.

*Hansberry v. Lee*, 311 U. S. 32, clearly recognizes that this sort of vicarious presence constitutes due process of law. The opinion must be read in the light of the real question presented, which did not involve virtual representation of the unborn but did concern the binding quality of judgments rendered in class or representative suits where the absentees are living persons. The state court judgment which was held to have denied due process was redolent with the fragrance of collusion in an attempt to adjudicate as against Negro property holders the validity of restrictions which were in fact void. This court held that the owners in a subdivision have not a common interest in the enjoyment of restrictions such as constitutionally to authorize one to "stand in judgment" for another in litigation concerning such restrictions, and carefully limited its ruling to the peculiar facts in hand: "We decide only that the procedure and the course of litigation sustained here by the plea of *res judicata* do not satisfy these requirements" of due process (p. 44).

After announcing the rule for class suits, the court said at page 42:

"It is evident that the considerations which may induce a court thus to proceed, despite a technical defect of parties, may differ from those which must be taken into account in determining whether the absent parties are bound by the decree or, if it is adjudged that they are, in ascertaining whether such an adjudication satisfies the requirements of due process and of full faith and credit. Nevertheless there is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is *res judicata* as to members

of the class who are not formal parties to the suit. Here, as elsewhere, *the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits* (citing cases); *nor does it compel the adoption of the particular rules thought by this court to be appropriate for the federal courts.* With a proper regard for divergent local institutions and interests (citing cases), this Court is justified in saying that *there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.* (Citing cases.)

"It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, \* \* \* or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. (Citing cases.)" (pp. 41-43)

See also cases cited in footnote 25, *supra*.

*Riley v. New York Trust Co.*, 315 U. S. 343, neither adds to nor detracts from the *Hansberry* ruling. The majority opinion is devoted to the full faith and credit clause of the Constitution and the concurring opinion of the Chief Justice rests upon the basic holding that the New York administrator "was not a party to the Georgia proceedings, nor was he represented by any of those who were parties"; that his interest was adverse to those who were parties and hence "To have bound him by represen-

tation of those so adverse in interest would have been a denial of due process" (p. 356).

These cases require only a proceeding which "fairly insures the protection of the interests of absent parties". Here we have continued and fair representation by five life tenants—potential parents and grandmother—four of them acting through a guardian whose true status is adviser to the court; we have another guardian *ad litem* appointed specially to protect the interests of the absentees, and we have the unrelenting insistence of the petitioner that the compromise is unfair to them. No more could be asked except that the wheels of justice stand still for an indeterminate period. The *Hansberry* decision is in nowise opposed to the proposition that: "Because the parties are not in being, and therefore cannot be brought before the tribunal, is not sufficient reason for a court to stand by, helpless and impotent, when rights of living persons, in ordinary common sense, ought to be adjudicated" [R. 604].

**The Trustee's Representation of the Unborn Remaindermen Is Alone Sufficient to Sustain the Jurisdiction of the Court.**

In an attack upon a trust the trustee is charged primarily with the duty of representing the interests of unknown and unborn beneficiaries.

Sec. 186 of the Restatement:

"A person, unborn at the time of the commencement of a judicial proceeding, to whom a future interest as the beneficiary of a trust has been limited is duly represented in such proceeding when the trustee of such trust is competent, under the rules of law of trusts, to represent such possible future beneficiary in such proceeding, and is duly joined as a party in such proceeding."

Chancellor Pitney in *Woolsey v. Woolsey*, 78 N. J. Eq. 517, said:

"Where courts have to deal with property whose ultimate destination is in doubt, and which may upon a certain contingency go to persons not yet *in esse* or not yet ascertained, they must perforce proceed without the attendance of such persons, or not proceed at all. *It results that such contingent interests are held to be bound, if the interest be represented in the litigation by a trustee or (in some cases) by the predecessor in estate.*"

To the same effect see:

*Burgess v. Nail*, 103 Fed. (2d) 37;

*DuPont v. DuPont*, 18 Del. Ch. 316;

*Temple v. Scott*, 143 Ill. 290;

*Bennett's Guardian v. Cary's Executor*, 210 Ky. 725;

*Watkins v. Bryant*, 91 Cal. 492;

*Johnson v. Curley*, 83 Cal. App. 627;

*Green v. Grant*, 143 Ill. 61;

*American Bible Society v. Price*, 115 Ill. 623;

*Perkins v. Burlington L. & Imp. Co.*, 112 Wis. 509.

Indeed, it was the absence of a trustee which caused a reversal of *McArthur v. Scott*, 113 U. S. 340; see explanation in *Miller v. Texas & Pacific Co.*, 132 U. S. at p. 671.

Obviously it is a question of state law whether the trustee "is competent, under the rules of law of trusts, to represent such possible future beneficiary in such pro-

ceeding”<sup>38</sup> and petitioner, in arguing the contrary (pp. 22-23), presents no Federal question.

“State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of ‘general law’ and however much the state rule may have departed from prior decisions of the federal courts. (Citing cases.)

“Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.” (*West v. American Tel & Tel. Co.*, 311 U. S. 223, 236-37.)

Counsel, who initially recognized and asserted the trustee’s right and duty to protect the interests of unborn contingent remaindermen under the sanction of *Gray v. Union Trust Co.*, 171 Cal. 637 [R. 375], now misinterpret the California decisions. The *Gray* case establishes that the trustee has an imperative duty in an attack upon the trust by the trustor to protect the interests of the unborn. To the same effect is *Estate of Hubbell*, 121 Cal. App. 38. The cases of *Eakle v. Ingram*, 142 Cal. 15, and *Moor v. Vawter*, 84 Cal. App. 678, hold that the trustee has no interest in the proceeding when

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<sup>38</sup>There is no Federal general common law (*Erie R. Co. v. Tompkins*, 304 U. S. 64, 78) or substantive equity jurisprudence (*Ruhlin v. N. Y. Life Ins. Co.*, 304 U. S. 202, 205).

all the beneficiaries are *sui juris* and before the court; and *Hutchins v. Security Trust and Savings Bank*, 208 Cal. 463, and *First National etc. Bank v. Superior Court*, 19 Cal. (2d) 409, that the trustee does not represent any living beneficiaries in such litigation.

The three classes of cases read together spell but one result, namely, that in an attack by the trustor upon the trust the trustee does not represent the living beneficiaries, it cannot complain of a termination where all beneficiaries are present, *sui juris*, and consenting, but that it does represent the unborn and unknown and represents them alone in this type of litigation; that petitioner herein, as trustee, was "competent, under the rules of law of trusts, to represent such possible future beneficiary" as a matter of state law and that its actual representation of the unborn at bar concludes them through the judgment.

**Trustee's Claim That Its Refusal to Consent to Compromise Destroys Court's Jurisdiction.**

Petitioner challenges the authority of the court to control its discretion in the premises. At Petition page 22 counsel say:

"If respondents here desire to depend on the trustee for jurisdiction by representation, they must accept the trustee's refusal to consent, and the compromise fails for want of consenting parties in so far as it purports to affect the property of the remaindermen."

But the trial judge overruled the contention and found:

"that the defendant Title Insurance and Trust Company as trustee of said trust should be instructed and directed to act and perform its duties in con-

formity with said declaration of trust as so modified, reformed and revised" [R. 521];

and ordered the trustee as well as the other parties to the action, "to abide by, perform and carry into immediate effect said compromise and each and all of the terms thereof" [R. 522]. See also R. 527.

And the ruling was eminently sound.

"A discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, but *may be controlled by the proper court if not reasonably exercised*, unless an absolute discretion is clearly conferred by the declaration of trust." (Cal. Civil Code, §2269.)

Directly in point is *Rose v. Southern Michigan Nat. Bank*, 255 Mich. 275, 278-9, wherein the court affirmatively compelled a testamentary trustee to accept a compromise over its own refusal so to do.

To the same effect are:

*Wolf v. Uhlemann*, 325 Ill. 165, 173, 184;

*Reynolds v. Reynolds*, 208 N. C. 578;

*Spencer v. McCleneghan*, 202 N. C. 662.

In *New York Life Ins. and Trust Co. v. Conkling*, the court said at page 642 of 144 N. Y. S.:

"But the court never hesitates to exercise its equitable powers in directing a trustee to use a portion of the trust property, if it becomes necessary, in order to protect the balance."

It is also argued that the court has no such power because a compromise is "consensual bargaining" (Petn. p. 27). But, so far as concerns an infant or unborn party, this is equally true of a judgment cancelling the trust for fraud, for a judgment is a contract of the highest order (*Gould v. Superior Court*, 47 Cal. App. 197, 200; *Jones v. Union Oil Co.*, 218 Cal. 775, 778). In the case of a judgment terminating the trust, the court makes the contract for the parties who are not *sui juris* just as in the case of a compromise. Clearly this argument is misplaced.

We have shown in our preliminary statement that the petitioner has affirmatively recognized the established principle that a trustee must represent unborn beneficiaries; that it has vigorously and ably waged a battle upon the merits of the compromise from the standpoint of the contingent remaindermen. Such complete representation binds the beneficiaries, as does any other case of competent trustee representation. One who has been thus protected through his legally constituted agent cannot assert that he has not had due process of law.

III.

**Unborn Contingent Remaindermen Do Not Own Any Property and Hence There Is No Subject Matter Upon Which the Fourteenth Amendment Can Operate.**

Heretofore we have discussed this case as if the unborn contingent remaindermen were on a parity with living owners of a vested remainder. But this is a gratuitous assumption made only for convenience of discussion. These unborn contingent remaindermen may never come into existence. At present they exist in the loins of the infant life tenants [the oldest aged sixteen; R. 543] whose mere volition may determine the existence or non-existence of such remaindermen. And the "estate" of these potential remaindermen is not an estate at all. The lower court decided that "they are all contingent remaindermen" [R. 599]. This, of course, connotes in this instance a lack of vesting.<sup>36</sup>

The so-called estate of unborn contingent remaindermen is a mere floating expectancy or possibility.<sup>37</sup> The "estate" is not in existence and may never be; the takers are not living and may never be born. Such an expectancy can hardly be termed "property" of the unborn,

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<sup>36</sup>See Civil Code, Secs. 694 and 695 quoted at pages 9-10, *supra*.

<sup>37</sup>See Restatement of Law of Property, Sec. 157, at pp. 563-4, and Cal. Ann. at p. 87, Comment w; *Estate of Whitney*, 176 Cal. 12, 18; *Estate of Troy*, 214 Cal. 53, 58; *Robinson v. N. Y. Life etc. Co.*, 133 N. Y. S. 257, 262-3; *Shindler v. Robinson*, 135 N. Y. S. 1056, 1060-61, 150 App. Div. 875, 880; *Du Bois v. Judy*, 291 Ill. 340, 347; *Hawkins & Roberts v. Jerman*, 147 Ore. 657, 664; *Mercer v. Downs*, 191 N. C. 203, 205; *Riverside Tr. Co. v. Twitchell*, 342 Pa. 558, 564; 31 C. J. S., Sec. 72, p. 91.

or "owned" by them (see 33 Am. Jur., §72, p. 532; 31 C. J. S., §81, p. 95).

In *Reynoldson v. Perkins*, Amb. 564; 27 Eng. Reprint 362, 363, decided in 1769, it is said with respect to contingent remaindermen:

"Lord Chancellor was clear of opinion, that the plaintiff was not entitled to redemption. That the first tenant in tail being a party to the bill of foreclosure was sufficient. That he sustained the interest of everybody, and *those in remainder were considered as cyphers.*"

And in *Knotts v. Stearns*, 91 U. S. 638, 640:

"The posthumous child did not possess, until born any estate in the real property of which his father died seised which could affect the power of the court to convey the property into a personal fund, if the interest of the children, then in being, or the enjoyment of the dower right of the widow, required such conversion. Whatever estate devolved upon him at his birth was an estate in the property in its then condition."

This type of contingent remainder differs materially from one owned by living persons (*County of Los Angeles v. Winans*, 13 Cal. App. 257, 260; and see cases in footnote 37).

The Fourteenth Amendment does not deal with abstractions or mere fictional concepts (see *Curry v. McCanless*, 307 U. S. at 374) or with "supposed rights of property which the state courts determine to be nonexistent" (*Fox River Paper Co. v. R. R. Com.*, 274 U. S. at 657). It

protects only vested rights<sup>38</sup> which *ex vi termini* excludes interests wholly contingent as at bar. "Constitutions are intended to preserve practical and substantial rights, not to maintain theories" (Holmes, J., in *Davis v. Mills*, 194 U. S. 457).

Such contingent rights may be altered without offending the Fourteenth Amendment or its due process clause.<sup>39</sup>

*Copeland v. Wheelright*, 230 Mass. 131, upheld a compromise of an estate controversy which completely annihilated the rights of the unborn contingent remaindermen, and did so from the standpoint of due process.

The trustee's own title is not such as the Amendment protects (*In re North Jersey Title Ins. Co.*, 120 N. J. E. 148, 155-6; *Williamson v. Suydam*, 6 Wall. 723, 738). This being the case, petitioner's claim of denial of due process is reduced to a series of speculations as to what may eventuate if any unborn contingent remaindermen should come into being, should survive all the life tenants, thus divesting the estate of Grace Garland and Jane Mary Garland and for the first time acquiring an estate of their own, and if they should then deny the binding effect of the instant judgment, should sue the trustee

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<sup>38</sup>Defined in *Pearsall v. Great Northern R. Co.*, 161 U. S. at 673.

<sup>39</sup>2 Cooley's Const. Lim. (8th Ed.), pp. 749-54; McGehee, *Due Process of Law*, p. 157; Note in 19 A. L. R. 247; *Jennings v. Capen*, 321 Ill. 291, 296-7; *Butterfield v. Sawyer*, 187 Ill. 598, 601; *Anderson v. Wilkins*, 142 N. C. 154, 157; 6 R. C. L., Sec. 303, p. 316; *Irving Trust Co. v. Day*, 314 U. S. 556, 562.

and fasten personal liability upon it for acts done under the coercion of a final decree of a court having jurisdiction over the trustee and the trust estate.

This court does not waste its time on such a multiplication of contingencies and their possible effects.

In the present instance the claim of denial of due process is no better than frivolous.<sup>40</sup> The petition should be denied.

Respectfully submitted,

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ALLEN W. ASHBURN,

*Solicitors for Respondent Harry C. Mabry, as Executor of the Last Will and Testament of William J. Garland, deceased.*

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<sup>40</sup>See 28 U. S. C. A., Secs. 878 and 861a; *Deming v. Carlisle Packing Co.*, 226 U. S. 102, 106; *Wagner Electric Co. v. Lyndon*, 262 U. S. 226, 233-4.